IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.B.KOSHY
&
THE HONOURABLE MRS. JUSTICE K.HEMA

THURSDAY, THE 4TH OCTOBER 2007 / 12TH ASWINA 1929

CRL.A.No. 780 of 2004(A)

SC.144/2001 OF ADDL. SESSIONS COURT (ADHOC-I), THALASSERY.
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APPELLANT/ACCUSED:

V.P. UMMERKUTTY, S/O. C.K. ASSAINAR HAJI
VAYALPEEDIKAYIL, SABIRA MANZIL, PUNNOL,
KODIYERI AMSOM, THALASSERY.

BY ADV. SRI.M.K.DAMODARAN (SR.),
ADV. SRI.M.P.PRABHANANDAN.

RESPONDENT/COMPLAINANT:

STATE OF KERALA, REPRESENTED BY THE
PUBILC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM.

BY PUBLIC PROSECUTOR SRI. K.C. SANTHOSH KUMAR.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 04/10/2007,THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

J.B.KOSHY & K.HEMA, JJ.

Crl.A.No.780 OF 2004

Dated 4th October, 2007

JUDGMENT

Koshy,J.

The appellant was convicted for offence punishable under Section 302 of the India Penal Code on the charge that on 20.2.1999 at about 7.50 p.m. while deceased Kumaran was working as a catering server in Parasuram Express which was going to Mangalore from Thiruvananthapuram, the accused entered the train for selling butter milk. When the train reached Thalassery Railway Station, the deceased Kumaran questioned the accused for conducting unauthorized sale of butter milk. When an altercation ensued between them, the train moved from the station. The accused beat Kumaran and pushed him from the train and Kumaran died from the injuries sustained by him. The fact that by fall from the train Kumaran sustained very serious injuries after the train left Thalassery Railway Station to Kannur is not disputed. Immediately he was taken to the Government Hospital, Thalassery. He was examined by PW20 doctor and doctor issued Ext.P7 wound certificate. The cause of injuries in the wound certificate is as follows:

> "ട്രെയിനിൽ നിന്നു അടിച്ച് റെയിൽ ട്രാക്കിൽ ഇട്ടപ്പോൾ ട്രെയിൻ കയറിയതിനാൽ ."

It was also stated that at the time of examination his right arm above the elbow was amputated and there was fracture of femur, pelvis etc. There were also injuries on the chest and abdomen. Pulse was feeble. He was conscious. There was lacerated injury 6x2 cm bone deep over the scalp in the middle above the hair line. During examination PW20 also stated the cause of injury was as alleged. The doctor was not cross examined. He also stated that the injured was also treated by the surgeon and he was referred to the Medical College Hospital, Calicut. The above would show that immediately after the incident the injured stated that he was pushed down from the train. Who pushed down was not stated to the police. However, from the statement of the injured as recorded by the doctor and on which there was no cross examination would prove that death of Kumaran was homicidal and not accidental or suicidal. He was pushed down from the train. PW22, Head Constable attached to Thalassery Police Station, went to the hospital and recorded Ext.P9 statement from the injured. In Ext.P9 it is stated that the deceased was a train server and he entered the Parasuram Express on 20.2.1999 early morning. When the train reached Thalassery station, he questioned a person aged about 48 years who was unauthorizedly selling butter milk in the train and there was an altercation with him. Immediately when the train started from Thalassery station, he was

beaten by that person and he was pushed down from the train as a result of which he sustained the injuries. Name of the accused was not disclosed. PW22, Police Head Constable, is another interesting witness. Even though it was argued that Ext.P9 cannot be accepted, a reading of Ext.P9 statement would show that it is not a concocted statement. An injured person, who is about to die gave a statement, though he was in a precarious condition. There was no chance for tutoring the witness. A reading of chief examination and the questions in the cross examination also would show that PW22 can be believed and Ext.P9 statement given by the injured as dying declaration can be relied on. In Ext.P9 the deceased was not able to state the name of the accused as he was not aware the name even though he has seen the person pushed him down. It has been held by the Apex Court in **Munnu Raja and another** v. **State of Madhya Pradesh** (AIR 1976 SC 2199) that statement of the victim recorded as F.I.S can be treated as dying declaration. Oral statement of the victim in a precarious condition need not give full account of the incident. In **Ramawati Devi** v. **State of Bihar** (AIR 1983 SC 164) it was held that dying declaration recorded by the police officer can be relied on, if the statement found corroborated from other witnesses. But, in Ext.P9 what is stated is that due to a quarrel with an unauthorised vendor he was pushed down. It will not connect the

accused with the crime.

2. Our next search is whether prosecution was able to prove that it is the accused who pushed him down from the train. According to the public prosecutor, evidence of PWs 4 to 7, though they were declared hostile, proves that the accused is guilty. It is true that even though a witness is declared hostile, his deposition need not be discarded totally and it is the duty of the court to find out the truth from the statement of the witness and take the grain leaving the chaff. When a person is declared hostile and differs from the statement given to police, his evidence is suspicious. The court will naturally look for some corroboration and some material while believing the part of the statement in favour of the prosecution. PW4 is a co-worker. He was also a server in the very same train. According to him, he was selling cutlet in the Pantry coach. He deposed that the deceased has quarelled with an unauthorized vendor and stated that unauthorized vendors should not supply butter milk in pantry. He also stated that he heard that the deceased Kumaran has quarrelled with unauthorised vendor and after some time somebody stopped the train by pulling the chain. He further stated that he heard that somebody has pushed down the deceased from the train and somebody stated to him that it is Ummerkutty (accused) who pushed

him down, but, he has not seen it. He was declared hostile and prosecutor was allowed to put questions to him. Detailed questioning was done by the prosecution. But, he stood stern that he has not seen the incident and he has only hearsay information.

3. PW5 is another server in the very same pantry. He was supplying tea and coffee. According to him, he stopped supplying at Thalassery and he reached the pantry. He did not identify the accused. He was also declared hostile and prosecutor was allowed to put questions to him. He departed from the 161 statement given to the police. Even though he was elaborately cross examined, he stated that he has not seen the incident. He further stated that he was very sad as his co-worker was killed. But, he also did not identify the accused and he stated that he has not seen the incident at all. He did not say anything connecting the accused with the crime.

4. PW6 is a cook in the pantry. He stated that he was also travelling in the very same Parasuram Express going from Thiruvananthapuram to Mangalapuram and it stopped at Thalassery Railway Station. At 7 O' Clock two persons came to the counter for taking tea. An unauthorised vendor came for selling butter milk and Kumaran stated that he should not sell butter milk, but, he is not

aware as to what happened thereafter. Somebody asked to pull the chain and PW5 Palani pulled the chain. He was not declared hostile. Even in the CD statement he has not identified the accused. So, his evidence also will not connect the accused with the crime. PW7 is also another co-worker. He was a server in the very same train. He was selling vegetable cutlet. He stated that the train moved from Thalassery Station, but, immediately the train was stopped and he was told that somebody pushed down the deceased and immediately he was taken to Thalassery Government Hospital. He also stated that he went to the hospital and the deceased was conscious. Police asked deceased regarding the incident. As he was referred to Medical College Hospital, he was taken to Medical College Hospital, Calicut. He, PW5 etc. were also with him. According to him, Kumaran has stated to the doctor that the accused has pushed him down. But, PW20 doctor clearly stated that the deceased did not mention the name of the accused. Even PW22 who recorded Ext.P9 statement stated that deceased did not state name of the accused and deceased did not know the name of offender even though he had previously also seen him. Anyway, the information is only hearsay and the statement is that deceased told the doctor that it is the accused who pushed him down from the train. That statement cannot be accepted in full as it is opposed to the deposition of PW20 doctor.

5. The only other witness examined to connect the accused with the crime is PW11. PW11 was the Station Master. At the time of the incident he was in the quarters. He also stated that hearing that somebody was pushed out from the train, he went to the Government hospital. He asked the injured who has done it and the injured answered that "മോരു വിൽക്കുന്ന ഉമ്മറാണ് എന്നും പറഞ്ഞു. " The alleged dying declaration to PW11 is not at all inspiring confidence. In **Laxman** v. **State of Maharashtra** ((2002) 6 SCC 710) it was held by a five member Bench of the Apex Court that dying declaration should be of such nature as to inspire full confidence of court in its truthfulness and correctness. It is not the plurality of the dying declarations that adds weight to the prosecution case, but, their qualitative worth is what matters. In **State of Maharashtra** v. **Sanjay S/o Digambarrao Rajhans** (2004 (8) SC 138), it was held that great caution must be exercised in considering the weight to be given to dying declaration as correctness of that statement cannot be tested by cross examining its maker. It could have been taken as true if that was stated by him in his earlier version. But, he has no such a case before the police in his 161 statement. First time he stated so in the court when he was examined after about five years of the incident. Therefore, from his evidence alone we cannot conclusively say that the accused was the person who pushed the deceased down. The

prosecution was clearly able to prove that somebody has pushed him down and there was a quarrel with an unauthorised vendor of butter milk and Kumaran and somebody pushed him down. But, there is no conclusive evidence to show who pushed him down. So, Ext.P11 F.I.R was registered on information given by the railway on the next day. Even at that time, crime was registered as `some unknown person pushed him down'. At the maximum, evidence of PWs 7 and 11 may caste suspicion on the accused, but, that will not substitute the conclusive evidence required in a criminal case. As held by the Apex Court in **Kali Ram** v. **State of H.P.** (AIR 1973 SC 2773) one of the cardinal principles which is always kept in mind is that a person arraigned as an accused is always innocent unless his guilt is proved by the prosecution by production of satisfactory evidence. Burden is on the prosecution to prove that aspect. Even if the accused is undefended, the court is not absolved from satisfying itself that evidence is sufficient to prove the guilt of the accused. The prosecution has to establish the charge beyond reasonable doubt and falsity or correctness of defence case is to be looked into only if prosecution proves the guilt as held by the Apex Court in **Tika** v. **State of U.P.** (AIR 1974 SC 155). So, even at that time, when the matter was reported to the police or when the deceased was brought to the hospital, nobody knew that who was the real accused. Totality of evidence would show that prosecution failed to conclusively prove

that accused is guilty of the crime as alleged. In any event, he is entitled to get the benefit of reasonable doubt.

6. In the result, we set aside the conviction and sentence passed against the appellant and he is acquitted. The appellant should be set at liberty forthwith if he is not required in any other case.

The appeal is allowed.

J.B.KOSHY
JUDGE

K.HEMA
JUDGE

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